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SUBJECT: UNESCO CULTURAL DIVERSITY CONVENTION: INTERGOVERNMENTAL
COMMITTEE DECISIONS MOVE CONVENTION ONE MAJOR STEP CLOSER TO FULL
IMPLEMENTATION, BUT DIFFICULT WORK STILL AHEAD

REF: PARIS FR 1342

11. Begin Summary. During its week-long second ordinary meeting, the 24-member Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions ("the IGC" or "the Committee") took decisive action on each of the items on its agenda, although two items (preferential treatment and the Fund) will require further work at the next session. One of the Committee's most important actions at this session was its consideration of six (6) experts' reports on the forms of "preferential treatment" that "shall" be given to developing countries by developed countries, according to Article 16 of the Diversity of Cultural Expressions Convention. The Committee determined, however, that it was not yet prepared to adopt operational guidelines on the complex issue of preferential treatment. It did adopt detailed operational guidelines to implement Article 13 (Integration of culture in sustainable development), Article 14 (Cooperation for development) of the Convention, and Article 18 (the Use of Resources of the International Fund for Cultural Diversity). Following a protracted philosophical debate, the Committee decided not to adopt operational guidelines to implement Article 12 (Promotion of international cooperation), concluding that Article 12's terms were sufficiently clear and needed no further elaboration. The Committee elected a new Chairperson (St. Lucia) and new Bureau (Croatia, India, Luxembourg, Oman and Senegal), and decided to schedule an extraordinary meeting (23-25 March 2009) before the June 2009 Conference of Parties meeting where all preliminary draft operational guidelines must be approved before they can become operational.

12. Summary cont'd. The meeting was, for the most part, ably chaired by the former Canadian Ambassador Gilbert Laurin. In terms of the Committee's political dynamics, what stands out from the debates thus far is an apparent growing North-South divide between developing and developed (particularly European) countries, especially when it comes to expectations for and approaches to implementation of this Convention. This divide could further widen when the Committee meets again in March 2009 where the politically sensitive issue of preferential treatment will be taken up and operational guidelines adopted on that subject. Moreover, at this stage of the implementation process, India, Brazil, St. Lucia, and South Africa have become a four-power axis that together routinely wield disproportionate and often distorting influence over the decisions of the Committee. They are increasingly using their collective power on the Committee to exploit the Convention's vague language to foster sometimes unintended interpretations of the Convention to foster their self-interests. This unsettling pattern of activity in the implementation of the Convention offers yet a further reason, in addition to others that can be cited, why the U.S. would be ill-advised to ever consider becoming a party to this Convention as currently worded and interpreted by the preliminary

draft operational guidelines. End Summary.

¶3. The IGC met from December 8-12, 2008 at UNESCO HQ for its second ordinary session. The U.S. was represented by an inter-agency Observer Delegation that comprised: Ambassador Louise Oliver (Delegation Head); Mission Legal Adviser T. Michael Peay; IO/UNESCO officer Laura Gritz; US Trade Representative (USTR) attach Ken Schagrin from the USTR Geneva Office; US Patent & Copyright Office attorney Michael Shapiro; and WHA/OAS officer Melissa Kopolow. USTR attorney Dan Mullaney (at USEU Brussels) was also an integral member of the U.S. delegation who was prepared to travel to Paris, on short notice, to ensure continuous USTR presence on our delegation. Several members of the U.S. delegation will retain continuing oversight responsibility to monitor implementation of this Convention when it becomes fully operational, not long after the change in the U.S. Administration. For this and other reasons, U.S. Mission UNESCO Permanent Representative, Ambassador Louise V. Oliver, considered it strategic to have an enhanced U.S. Observer delegation at this important Committee session, the better to ensure continued, close U.S. inter-agency coordination and joint oversight of this instrument whose implementation has important implications for U.S. multilateral, trade and other related interests.

¶4. Article 12's Draft Operational Guidelines. The meeting got off to a bumpy start when a contentious philosophical debate arose over the need for guidelines to implement Article 12 (Promotion of International Cooperation). Complicating that debate was a collateral disagreement over whether, in connection with that Article, the Committee should also adopt a proposed set of guiding "principles." This idea was favored by a number of developing countries, but strongly opposed by most of the Committee's European members, who considered the principles redundant to those already contained in the Convention itself. India wanted to add yet a further principle that in effect would have said that "the current

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international financial crisis should not be used as grounds to diminish international cooperation." The debate over whether to adopt draft guidelines and draft principles under Article 12 was protracted and at times sharply divisive pitting outspoken developing countries like India, Mali, and Brazil against developed countries like France, Germany, and Luxembourg. During the course of the debate, Brazil accused France and other Northern countries of wanting to use the Convention to foster continued trade relationships that in practice tend to benefit the North 90 percent of the time and the South only 10 percent. This insinuation was sharply rebuffed by France, and this exchange set an early tone for similar North-South tensions that played out in the discussions during the course of the week.

¶5. After much back and forth, the Committee ultimately decided not to adopt any operational guidelines on the promotion of international cooperation because "Article 12 is self-sufficient." But, at the closing session, India reminded the Committee that it had nearly overlooked its decision to return to the issue of what to do about the principles. (That decision had been made earlier in the week to get around the gridlock this issue had caused so early in the meeting.) India then accused the Secretariat of "bad faith" for failing to remind the Committee of this fact. A vain attempt to re-open discussion on the principles quickly led to renewed North-South divisions on this issue. So, with no remaining time for discussion at the closing session, the Committee decided to bracket the draft principles and defer discussion of them to a follow-on meeting where it would be finally decided whether they should be retained or discarded. This exchange on the final day soured what was supposed to have been a happy ending to the 5-day session and instead offered an identical bookend for how the meeting had begun.

¶6. (Article 13's Draft Operational Guidelines (Culture for sustainable development). Brazil put forward an extensive set of amendments for these draft guidelines the debate over which consumed a considerable part of two sessions. Some Committee members were sympathetic to the socio-political goals behind a number of Brazil's proposed amendments, but saw them as going far beyond the scope of Article 13. Brazil mentioned emphatically a recent OAS ministerial meeting at which OAS Member States agreed to "reinforce cultural

industries in developing countries" and urged OAS Member States to carry that message into these UNESCO deliberations. Luxembourg said that Brazil's suggestions were too broad for operational guidelines, and India said they didn't fit into the subject matter of Article 13. Moreover, Brazil's relentless attempts to include education-related concepts into these operational guidelines were also thwarted when Germany said that education in sustainable development belonged in UNESCO's Education Sector, not in this Convention. It was only after Brazil finally realized it had no support that it decided to withdraw its proposed amendments. The Committee then proceeded, without too much further ado, to adopt a set of detailed draft operational guidelines on the integration of culture into sustainable development under Article 13. Among the salient points which the guidelines cover include provisions calling upon States Parties: to realize the full potential and contribution of cultural industries to sustainable development; to recognize the needs of women, of various social groups (including minorities and indigenous peoples), and of disadvantaged areas; and to facilitate the elaboration of statistical indicators, the exchange of information, and the dissemination and sharing of best practices. These preliminary draft operational guidelines will be recommended to the Conference of Parties to the Convention for consideration and final adoption when the Conference meets in June 2009.

17. Article 14's Draft Operational Guidelines (Cooperation for Development). Several aspects of these draft guidelines became sources of notable tension between the countries of the South and the North on the Committee. For example, Northern/developed countries came under heavy pressure over their denials of temporary entry visas for artists coming from the South. This, it was said, hinders the international mobility of such artists and thus their ability to promote the diversity of cultural exchanges. Many Committee members from the South asserted that meaningful implementation of this Article should entail the "right" to unlimited access and mobility of artists and should include special, flexible visa regimes to that effect. There was an interesting, but inconclusive, verbal tug of war between the Ambassadors of India and France over how to address the issue of visas for artists from developing countries. In an effort towards compromise, the draft guidelines were amended to include a clause that calls for measures to facilitate "the mobility of artists and other cultural professionals and practitioners from developing countries and their entry into the territory of developed and developing countries through, inter alia, consideration of flexible short-term visa regimes in both developed and developing countries to facilitate such exchanges." The guidelines agreed to also call for

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"institutional, regulatory, legal, and financial incentives" to support distribution/dissemination of cultural activities, goods, and services.

18. China successfully urged the inclusion of a provision in the guidelines that calls on developed countries to supply "fair and favorable conditions for technology transfer to developing countries." In a similar vein, the Article 14 guidelines also contemplate several other highly ambitious measures including, among other things, "joint development of technology for the benefit of developing countries," and "tax benefits" for "micro, small- and medium- sized enterprises, cultural industries, artists, professionals, practitioners of the cultural sectors." Notably, with these kinds of amendments now contained in the Article 14 operational guidelines, they have indirectly become another category of preferential treatment measures for developing countries. The crucial difference is that the guidelines for Article 16 make "preferential treatment" for developing countries mandatory, for certain specified purposes, while Article 14 encourages a broader scope of such treatment on a discretionary basis. The guidelines for Article 14 will also be submitted to the Conference of Parties for consideration and final adoption in March 2009.

19. Article 18's Draft Operational Guidelines (International Fund for Cultural Diversity). The debate concerning these guidelines produced several interesting sources of tension during the debate. One source of tension was between those who wanted the guidelines to ensure preferential access to the Fund for the neediest, i.e., the

"least developed countries," versus applicants to the Fund who come from countries considered as "developing" but that have attained comparatively higher levels of development (e.g., India, Brazil, and China). Towards that end, Mali tried, but failed, to get in language that would have required consideration of "the multiplicity and development status of beneficiaries." The European states generally supported making such a distinction, in order to favor the neediest countries. However, India, in a bold move, motivated no doubt by self-interest, succeeded in blurring such distinctions among developing countries in as many places as it could in the body of the guidelines. (Comment: This issue of making a distinction in the "developing" status of different countries will probably remain a tender spot and possibly come back to haunt the implementation process downstream when competing requests for funding begin streaming into the Fund from both developing and least developed countries)End Comment.

¶10. A second source of tension that arose under Article 18 was whether "official development assistance" (ODA) from European and other northern countries could be donated to, and used as part of, the Fund, consistent with provisions applicable to the Fund. That issue opened a complicated and somewhat inconclusive debate over whether the ODA in question would be offered without conditions, or whether it would be "tied or earmarked." That in turn led to discussion of what is meant by "tied or earmarked." Countries like Brazil and St. Lucia asserted that funds offered with conditionality and restrictions are not permitted under UNESCO's rules applicable to "special accounts," nor by Article 18(6) of the Convention (which provides "No political, economic or other conditions that are incompatible with the objectives of this Convention may be attached to contributions made to the Fund.") Curiously, when France and other Europeans expressed their support for distinguishing between developing and least developing countries so as to favor the latter, they were accused by Brazil of seeking to use their ODA to "tie" European financial assistance simply to conform to EU regulations and norms for such prioritized assistance. UNESCO's Legal Adviser's Office was asked to opine on the legality of using ODA funds in connection with the Cultural Diversity Fund. He began by noting that the issue was "a bit delicate" but ultimately concluded that each ODA contribution would need to be assessed by the Committee in the light of Article 18(6) of the Convention and the specific facts relating to each particular contribution.

¶11. A prospective third source of tension that could later arise under Article 18 is "the examination of possible alternatives for fundraising for the Fund, including innovative financial mechanisms." This very issue has already been inscribed on the agenda for the second extraordinary meeting of the IGC in March 2009, at the insistence of Brazil and Jamaica. It is likely to become a basis for Brazil to renew (for the third time in this Committee) its proposal to impose a tax on foreign blockbuster films (read: U.S. films) that are screened in developing countries. Using such a tax as an innovative means to raise money for the Fund would, if adopted, almost certainly pit certain developed countries against some developing countries, and immediately raise trade concerns. To date, however, the Committee has not shown much interest in this idea, but time will tell if opinions have evolved. The preliminary draft guidelines for Article 18 agreed to by the Committee at this

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session are detailed and fairly extensive. They cover such fields as: objectives of the Fund; activities for which the Fund can be used; the intended beneficiaries; and procedures for submitting and approving requests. The Secretariat noted that the Fund currently has deposits totaling USD 950,000.00 (plus another USD 50,000.00 that Belgium has promised for 2009). The secretariat also announced that, in conjunction with its aim to develop a fund-raising strategy, it will host a seminar near the end of January/beginning of February 2009 on ways to increase contributions to the Cultural Diversity Fund, targeting potential private sector donors.

¶12. Preferential Treatment (Article 16). The process of actually drafting operational guidelines to implement the preferential treatment provisions of Article 16 of the Convention has not yet begun. In deference to the technical complexity this issue, the IGC devoted one of its morning sessions to reviewing the written reports

presented by a panel of six (6) experts. To assist Committee and the secretariat to prepare draft guidelines for review at the next meeting, two experts (who served as "Coordinators") attended the Committee meeting and provided a power point review of the key findings in the six experts' reports. They also freely engaged the Committee in a question and answer session. The format for this encounter between Member States and experts (incidentally) served as an excellent (if far too rare) example of how UNESCO can provide Member States with a constructive forum for meaningful, two-way exchanges of views with outside experts. Not only did the Coordinators offer first-rate summaries and oral presentations of their personal views on several key issues relating to preferential treatment. They also openly and constructively debated between themselves points on which they disagreed. The overall encounter served both to enlighten Member States and to underscore for all concerned the inherent complexity of the preferential treatment issue - even for experts in this field. One Coordinator (Professor Vera Thorstensen, from Brazil) distributed a very helpful three-page summary document entitled "Reports on Article 16: Overview", which she prepared that lists the key conclusions on which nearly all experts agreed. The full text of that document can be found at paragraph 23 below. Among the most important of its conclusions are the following:

-- the concept of preferential treatment within the meaning of Article 16 must be interpreted in the light of other relevant provisions of the Convention, in particular Article 14 on cooperation for development.

-- the concept of preferential treatment is wider than a narrow trade understanding and must draw on "cultural cooperation mechanisms" that go beyond just trade.

-- preferential treatment can be made conditional upon respect for the Convention's guiding principles, e.g., Article 2 (respect for human rights and fundamental freedoms, etc.)

-- existing WTO and other international legal frameworks should be used creatively, where feasible, to achieve the goals of preferential treatment, for purposes of the Convention.

¶13. During the afternoon of Thursday, December 11, the Committee met (without the experts present) and discussed at length the experts' reports and the interchange with the experts from earlier that day. A number of Committee members also offered for the record their respective country views on issues related to preferential treatment. Once again, divergent perspectives between the North and the South became quickly apparent. An important example of divergence relates to the issue of who should benefit from preferential treatment, and what criteria should be used to determine eligibility.

¶14. The issue of granting temporary visas to artists and other cultural professionals, and instituting new legal regimes to "guarantee" the issuance of such visas, came up again (as it did under Article 14) in the context of preferential treatment and will likely continue to loom as a major issue. Nearly all Committee members from the South strongly favor flexible visa regimes. Discussion of preferential treatment under Article 16 was often conflated with the terms of Article 20 (the relationship of the Convention with other instruments), including the issue of whether the Article 16 guidelines should specifically take into account the content of Article 20. (St. Lucia, for instance, said that the Article 16 guidelines should be drawn up entirely at UNESCO with no input from the WTO in Geneva; South Africa stated that Article 16 is a lever that should be used to counter other multilateral organizations such as the WTO; India acknowledged the synergy between Articles 16 and Article 20, while noting that those articles clearly implicate WTO and WIPO, demonstrate the complexity of this Convention, and indicate why this Convention should not infringe

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upon other legal regimes; the European Commission (speaking for all EU Member States, invoking its competence on trade matters) opposed making any mention of Articles 20 or 21 in the Article 16 guidelines); Brazil proposed organizing a UNESCO-WTO seminar on the

issue of preferential treatment, though most Committee members thought this idea premature. Interestingly, many Committee members were (or seemed) insufficiently aware of the Convention's implications on the international trade regime. This melange of views will need to be reconciled in the Committee's subsequent sessions.

¶15. In the United States delegation's only intervention on a substantive issue as an Observer State, USTR representative Ken Schagrin read a cleared statement that offered U.S. views, for the record, on the issue of preferential treatment. The full text of that statement can be found at paragraph 22 below.

¶16. The Bureau for the Committee decided that it would be prudent to give IGC members, and their governments, additional time to reflect further on the issue of preferential treatment and what the content of draft guidelines on this issue should be. To assist that process, it was decided that the secretariat would prepare a short "Questionnaire" on this issue to be sent out immediately to IGC members and to other States Parties to the Convention. When the chairman then approved a request to allow select representatives from civil society to also reply to the questionnaire, U.S. Ambassador Oliver intervened to ask whether Member States of UNESCO that are not parties to the Convention would also be allowed to offer comments in response to the questionnaire, India (more delicately) and St. Lucia more sharply intervened to oppose any involvement by such non-States Parties in the questionnaire process.

St. Lucia added tartly "If you want to be heard on this, then join the Convention." No other delegation spoke up on the question and the Chairman ruled against the U.S. request. The U.S. then immediately intervened one time further to explain (for the record) that our request had been based in part on the fact that all UNESCO Member States, through their assessed contributions, are helping to fund the secretariat staff costs to implement this Convention, and thus should have an opportunity to be heard on these issues as well.

The following day, the representative from Belgium stated that his country was not yet a party to the Convention but was actively progressing through its internal political steps towards ratification of the Convention. Belgium noted that it had already given USD 50,000.00 to the Cultural Diversity Fund for 2008 and would give a similar amount in 2009. It then asked to be allowed to offer comments on the questionnaire. The chairman politely declined Belgium's request, explaining that the preceding day the Committee had turned down a similar request from another State non-party to the Convention (the U.S.) and therefore the issue was closed.

¶17. In wrapping up its discussion on Preferential Treatment, the Committee adopted a decision that: took note of the debate that occurred on that subject; underlined the importance of early implementation of preferential treatment for developing countries; authorized the preferential treatment questionnaire to be sent out, with responses due before 31 January 2009; and requested the secretariat to present to the IGC at its next session "preliminary draft Operational Guidelines on Article 16" taking into account the replies received to the questionnaire. It is worth noting that in the six experts' reports on preferential treatment, and in the Committee's discussions during the week, there were a surprising number of references to the protection of intellectual property rights (IPR) and traditional knowledge (TK), including folklore. (Comment: During negotiation of the Convention, the U.S. strongly urged that a substantive provision be included affirming the positive role that IPR could play in fostering cultural diversity and diminishing the damaging effects of piracy on local creative and cultural industries, especially in developing countries. U.S. views, however, were largely ignored and yielded only a single, weak reference to IPR protection in the Convention's preamble. It is now interesting to see that experts from three countries that helped to squelch U.S. views on IPR during the negotiations (India, South Africa, and Barbados) have come around to validating U.S. views about the value of IPR protections. The rising focus on IPR and TK within the Committee's deliberations is further indication of a need for ongoing close monitoring of these issues in order to ensure the Convention is implemented in a manner not inconsistent with U.S. IPR interests and in a manner that complements rather than conflicts with ongoing work at WIPO on these issues. End Comment).

¶18. Proposed Agenda Items for Committee's Extraordinary Session (23-25 March 2009). The debate centered largely on the need to

ensure that Article 16 remains the primary focus at the Committee's extraordinary session and that adequate time is set aside to review and approve draft guidelines for preferential treatment under Article 16. Brazil stressed the need also to devote serious time at

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that session to discussing alternative forms of funding the Fund, "including through innovative means." Views on "innovative means" diverged, again along North-South lines, with the German Ambassador saying that "innovative" ideas for funding the Fund fall within the prerogative of Finance Ministers, not this Committee.

¶19. Election of New Committee Officers. Brazil moved the nomination of St. Lucia (Mrs. Vera Lacoëuilhe) to become the new chairperson (replacing former Canadian Ambassador to UNESCO Gilbert Laurin), and this motion was quickly adopted by acclamation. Mr. Mouhamed Konat from Senegal was elected Rapporteur, and Croatia, India, Luxembourg and Oman were elected Vice-Chairperson of the Committee. In order to secure India's re-election to the Committee in conformity with the Committee's rules, however, the Committee had to suspend "exceptionally for this election the application of Article 12.1 of its Provisional Rules of Procedure providing for non-immediate re-eligibility of the members of the Committee." This was done at the recommendation of UNESCO's legal adviser without controversy in order to ensure that the Asian-Pacific region has fair geographical representation on the Bureau.

¶20. Other Business. Two complaints of a procedural nature came up and were briefly discussed under the rubric of "Other Business." The first complaint was from the in-coming chairperson (St. Lucia), who observed that of the 94 States Parties to the Convention only about a dozen States thus far had made regular, or any, contributions to the International Fund for Cultural Diversity established by Article 18 of the Convention. St. Lucia issued an appeal for more regular, voluntary contributions and said this needs to be taken up at the next (March 2009) meeting. The second complaint came from two sources, Tunisia and India. Tunisia, speaking on behalf of itself and Oman, used this occasion to chide the Secretariat once again (as Tunisia had done earlier in the week) for having shown religious and cultural insensitivity in scheduling the Committee's meetings during a week that coincided with one of the most important Muslim holidays (Eid al-Adha, December 8 and 9). India leapt in to voice a similar and more generalized complaint about poor scheduling of UNESCO meetings by the Secretariat; about the latter's need to show greater sensitivity toward all religious holidays in scheduling meetings; and about the failure to schedule a pause in this Committee meeting in order to allow members to participate briefly in the Director General's special program on December 10 that commemorated the sixtieth anniversary of the Universal Declaration of Human Rights. These complaints (all valid) added further to the dark mood in the room during the closing session of the meeting.

¶21. Begin Comment. North-South geo-political cracks have clearly begun to emerge within the group of States Parties that had previously represented an unbreakable solidarity front on the issue of cultural diversity. There are reasons to believe that this divisive pattern will continue and perhaps lead to either gridlock or a glacial pace in the implementation of this Convention. The March 2009 extraordinary meeting could therefore become a kind of fork in the road for the Committee. For instance, how it deals with the "preferential treatment" guidelines may become a key indicator of the direction in which this Committee is headed. A second important indicator of the Convention's prospective success or failure could well be how the Committee disburses money from the Fund, and its political ramifications. The pattern of frequent Committee meetings that have occurred since December 2007, including the extraordinary session set for March 2009, represents a growing drain on the Culture Sector's limited budget for hosting all UNESCO convention meetings. If continued, it is likely to become an on-going disproportionate claim upon those budgetary resources.

¶22. Comment cont'd. The Committee's new Bureau of member states (as well as the individual personalities on it) will also play a key role in how effective this body will be in achieving its ambitious goals. Most states on the new Bureau are comparatively weak, which

will ensure that India and St. Lucia will have little difficulty exerting disproportionate influence on key issues. Together, India, St. Lucia, Brazil and South Africa will likely continue collaborating closely and be determinative voices in guiding the Committee's work. The Europeans on the Committee (including, at times, the voice of the European Commission) as well as Canada, will probably (and some would say, deservingly) face formidable challenges ahead, as they try to walk the difficult line between blunting the extremist impulses of developing countries on the Committee, while trying to show continued solidarity with those very countries on the cultural diversity issue. It appears that the North-South coalition of expediency that engineered adoption of the Convention in 2005 is starting to fray, at least at this stage of the implementation process. In this vein, a prominent member of the Brazilian delegation, in a moment of discreet candor, told a U.S. delegation member that one reason why he personally regrets the U.S.

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is not inside the Convention framework is because he does not trust the Europeans and finds them to be Janus-faced about this Convention.

¶23. Comment cont'd. U.S. delegation members noted, with disappointment, that a number of delegations openly or privately expressed hope that the new U.S. Administration would do an "about-face" on this Convention and make them all happy. When appropriate opportunities were presented, U.S. delegation members cast serious doubt on this ill-founded assumption, adding of course that they could not speak for the new Administration. For this and other reasons, it is important that the U.S. continue closely monitoring the implementation of this Convention through our inter-agency observation delegation. Sustained U.S. oversight will help ensure that the new Administration is kept well informed about the determined joint efforts of the Committee and UNESCO's secretariat to use this Convention offensively as a way to give greater international prominence to the potent issue of culture. Sustained oversight of all Convention-related meetings will also ensure that all relevant sectors of the U.S. Government remain mindful of the continuing dangers and challenges that this flawed Convention and its implementation can pose to important U.S. foreign relations, trade, and other related interests. End Comment.

¶24. Text of U.S. Statement on Preferential Treatment:

BEGIN TEXT

Draft Statement for the Record of the United States of America on the Issue of Preferential Treatment (Article 16 of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions)

As the United States is not a party to the Convention, we have listened with interest to the Committee's deliberations, but have refrained, as an Observer State, from making formal comments. However, we would like to take advantage of this opportunity to commend the efforts made by the Experts in their reports to provide constructive perspectives on Article 16. The United States recognizes that expanding the interpretation to include most forms of capacity building provides a more robust - and probably more effective - set of implementation options than a narrower focus on preferential market access in a strictly trade-related sense.

From the beginning, we have always noted, as one of our several concerns, that the path of this Convention not collide with trade agreements, and that if anything this Convention and trade and intellectual property rights agreements should work as complementary instruments to advance cultural diversity. Trade plays a critical role in expanding access for cultural goods and services, particularly for developing countries.

Indeed, where governments choose to restrict access to cultural goods and services, the Convention's stated objective of promoting cultural diversity is not served. Certainly preferential treatment can facilitate cultural exchanges and foster greater cultural understanding, cooperation and development. And, so too can an open trade environment that allows for the free flow of cultural goods

and services to complement the free flow of ideas called for in UNESCO's Constitution. Indeed, the principles embedded in trade agreements - opportunity, predictability, fairness - are essential to expanding cultural industries and diversity - and are something that can enrich us all.

Therefore, preferential treatment based on merit or economic need can comfortably co-exist with trade agreements, and they should be considered as mutually enhancing complements to each other rather than mutually exclusive.

So in conclusion, we would urge Parties drafting operational guidelines, as well as when preparing answers to the Committee's questionnaire, for this Article to bear in mind that, for the United States, this Convention must remain complementary to and fully compatible with current as well as future trade obligations that are shared by countries of the both the North and South.

Thank you, Mr. Chairman and members of the Committee, for this opportunity to speak, and we ask that this statement be included in the records of this meeting.

- As submitted to the Convention's Intergovernmental Committee on December 11, 2008. END TEXT.

125. Text of Summary of Experts' Reports on Article 16: Overview:

BEGIN TEXT

Reports on Article 16: Overview

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Section B (The Concept of Preferential Treatment)

- All experts have endorsed the view that the concept of preferential treatment within the meaning of Article 16 of the Convention must be interpreted in the light of other relevant provisions of the Convention, in particular Article 14 on cooperation for development.

- All experts have argued that the concept of preferential treatment under Article 16 is wider than a narrow trade understanding. Aimed at facilitating cultural exchanges between developed and developing countries, preferential treatment must not be construed in mere trade terms but rather build on partnership and cooperation.

- All experts agreed that preferential treatment can be provided through a variety of means and methods. Trade instruments are obviously one option. However, preferential treatment, as understood from the Convention's perspective, must also draw on cultural cooperation mechanisms. The latter could involve:

- funding agreements and exchange arrangements,
- sharing of resources and experience on best practices,
- technical capacity building and transfer of technology,
- specific fiscal incentives,
- visa facilitation arrangements,
- education and training,
- joint production and diffusion of cultural expressions,
- joint investment, etc.

- The experts of Tunisia, South Africa, India and Brazil have also discussed some common concepts developed in the field of trade with a view to avoiding circumvention of preferential treatment. Positions have varied, representing a rich source for the IGC's debate.

- With regard to the eligibility of developing countries to benefit from preferential treatment in the field of culture, some authors have taken the position that a distinction among developing countries that are at different stages of development could

undermine attainment of the Convention's objectives. Others have argued that existing classification criteria based on economic indicators or a country's self-declaration could be used, coupled with additional cultural policy-related considerations.

- As regards reciprocity, namely the granting of reciprocal preferences, most experts have advocated that non-reciprocity is congruent with the objective of supporting the emergence of viable cultural industries in developing countries and correcting imbalances in cultural exchanges

- Experts have also agreed that preferential treatment can be conditional upon respect for the guiding principles of the Convention (Article 2)

- Regarding graduation, that is the phasing out of preferences as the beneficiary countries reach a certain level of development, whilst some experts have argued against graduation, noting amongst others the difficulty in determining objective and transparent criteria in this respect, others suggested considering graduation on a case-by-case basis.

- Finally, in relation to rules of origin and their relevance for the provision of preferential treatment in the field of culture, some experts took the view that there can be no alternative to preventing circumvention of the mechanism of preferential treatment. For others, rules of origin are not suitable when preferential treatment is granted to cultural expressions which are not locally specific.

Section C (The legal and institutional framework concerning preferential treatment granted by/to the country/group of countries under study)

- All experts have investigated the structures put in place for the provision of preferential treatment by/to the country/group of countries under study, as well as the scope, extent and nature of the preferences granted.

- On the basis of the information provided, a broad distinction between donors and beneficiaries of preferential treatment may be drawn. Tunisia and the ACP countries enjoy preferential treatment in the field of culture, including by the EU. India and Brazil are

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principally portrayed as donors of preferential treatment towards developing and least developing countries. The evidence provided in relation to South Africa revealed that preferential treatment for culture is not a central feature of the agreements concluded.

Section D (Analysis of existing agreements and preferential treatment mechanisms)

- The experts' reports attested to the variety of the preferential treatment mechanisms used or needed in the cultural field and revealed how different policy spaces can be used in order to facilitate cultural exchanges between developed and developing countries.

- The Tunisian case study was based on the EU- Tunisian association agreement and the bilateral French-Tunisian cultural cooperation agreement. The EU and the Caribbean reports discussed the Economic Partnership Agreement (EPA), signed between the EU and Cariforum on 15 October 2008. The Brazilian case study examined preferential treatment for the audiovisual sector mainly on the basis of various bilateral and regional co-production agreements with developed and developing countries. The Indian case study focused on the audiovisual sector and yoga, investigating the need for the provision of preferential treatment in their regard. The South African report confirmed that preferential treatment for culture is not readily inscribed in the country's bilateral, regional and multilateral agreements and explored the need for preferences for most South African cultural sectors.

Section E (Conclusions and recommendations)

- Many of the recommendations formulated by the experts display similarities, suggesting a certain level of convergence.

- The effective implementation of Article 16 requires the exploration or both trade and non-trade instruments.

- Preferential treatment is facilitated when it links partners which formulate and implement policies conducive to the promotion of cultural activity.

- Coherence must be ensured between preferential treatment and other development cooperation instruments for preferential treatment to have a lasting impact on cultural exchanges between developed and developing countries. Development cooperation measures which target the emergence and development of viable local cultural markets, as well as the training of artists, cultural professionals and practitioners on key competencies are particularly pertinent.

- Regional cooperation between developing countries and between developed and developing countries is considered to be an asset for preferential treatment.

- Civil society can make an important contribution to the identification and clarification of the needs of developing countries in the cultural sector.

- Most experts also agree that the formation of appropriate institutions to manage and monitor preferential treatment schemes should be given serious consideration. END TEXT
OLIVER